

AMENDED IN SENATE JUNE 2, 2015
AMENDED IN SENATE APRIL 22, 2015
AMENDED IN SENATE MARCH 16, 2015

SENATE BILL

No. 178

Introduced by Senators Leno and Anderson
(Principal coauthor: Assembly Member Gatto)
(Coauthors: Senators Cannella, Gaines, Hertzberg, Hill, McGuire, Nielsen, and Roth)
(Coauthors: Assembly Members Chiu, Dahle, Gordon, Maienschein, Obernolte, Quirk, Ting, and Weber)

February 9, 2015

An act to add Chapter 3.6 (commencing with Section 1546) to Title 12 of Part 2 of the Penal Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

SB 178, as amended, Leno. Privacy: electronic communications: search warrant.

(1) Existing law provides that a search warrant may only be issued upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched. Existing law also states the grounds upon which a search warrant may be issued, including, among other grounds, when the property or things to be seized consist of any item or constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony, or when there is a warrant to arrest a person.

This bill would prohibit a government entity from compelling the production of or access to electronic communication information or

electronic device information, as defined, without a search warrant or wiretap order, except for emergency situations, as defined. The bill would define a number of terms for those purposes, including, among others, “electronic communication information” and “electronic device information,” which the bill defines collectively as “electronic information.” The bill would require a search warrant for electronic information to encompass no more information than is necessary to achieve the objective of the search and would impose other conditions on the use of the search warrant or wiretap order and the information obtained, including retention and disclosure. The bill would, subject to exceptions, require a government entity that executes a search warrant or wiretap order pursuant to these provisions to contemporaneously provide notice, as specified, to the identified target, that informs the recipient that information about the recipient has been compelled or requested, and that states the nature of the government investigation under which the information is sought. The bill would authorize a delay of 90 days, subject to renewal, for providing the notice under specified conditions that constitute an emergency. The bill would require the notice to include a copy of the warrant or order or statement describing the emergency under which the notice was delayed. The bill would provide that electronic information obtained in violation of these provisions would be inadmissible in a criminal, civil, or administrative proceeding. The bill would provide that a California or foreign corporation, and its officers, employees, and agents, are not subject to any cause of action for providing records, information, facilities, or assistance in accordance with the terms of a warrant, wiretap order, or other order issued pursuant to these provisions. ~~The bill would also require a government entity that obtains electronic information pursuant to these provisions to make an annual report to the Attorney General, and would require the Department of Justice to annually publish a summary of the report on its Internet Web site. By requiring local law enforcement entities to make those annual reports, this bill would impose a state-mandated local program.~~

(2) The California Constitution provides for the Right to Truth in Evidence, which requires a $\frac{2}{3}$ vote of the Legislature to exclude any relevant evidence from any criminal proceeding, as specified.

Because this bill would exclude evidence obtained or retained in violation of its provisions in a criminal proceeding, it requires a $\frac{2}{3}$ vote of the Legislature.

~~(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.~~

~~This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.~~

Vote: $\frac{2}{3}$. Appropriation: no. Fiscal committee: yes.
State-mandated local program: ~~yes~~*no*.

The people of the State of California do enact as follows:

1 SECTION 1. Chapter 3.6 (commencing with Section 1546) is
2 added to Title 12 of Part 2 of the Penal Code, to read:

3
4 CHAPTER 3.6. ELECTRONIC COMMUNICATIONS PRIVACY ACT
5

6 1546. For purposes of this chapter, the following definitions
7 apply:

8 (a) An “adverse result” means any of the following:

9 (1) Danger to the life or physical safety of an individual.

10 (2) Flight from prosecution.

11 (3) Imminent destruction of or tampering with evidence.

12 (4) Intimidation of potential witnesses.

13 (5) Serious jeopardy to an investigation or undue delay of a
14 trial.

15 (b) “Authorized possessor” means the possessor of an electronic
16 device when that person is the owner of the device or has been
17 authorized to possess the device by the owner of the device.

18 (c) “Electronic communication” means the transfer of signs,
19 signals, writings, images, sounds, data, or intelligence of any nature
20 in whole or in part by a wire, radio, electromagnetic, photoelectric,
21 or photo-optical system.

22 (d) “Electronic communication information” means any
23 information about an electronic communication or the use of an
24 electronic communication service, including, but not limited to,
25 the contents, sender, recipients, format, or location of the sender
26 or recipients at any point during the communication, the time or
27 date the communication was created, sent, or received, or any
28 information pertaining to any individual or device participating in

1 the communication, including, but not limited to, an IP address.
2 Electronic communication information does not include subscriber
3 information as defined in this chapter.

4 (e) “Electronic communication service” means a service that
5 provides to its subscribers or users the ability to send or receive
6 electronic communications, including any service that acts as an
7 intermediary in the transmission of electronic communications, or
8 stores electronic communication information.

9 (f) “Electronic device” means a device that stores, generates,
10 or transmits information in electronic form.

11 (g) “Electronic device information” means any information
12 stored on or generated through the operation of an electronic
13 device, including the current and prior locations of the device.

14 (h) “Electronic information” means electronic communication
15 information or electronic device information.

16 (i) “Government entity” means a department or agency of the
17 state or a political subdivision thereof, or an individual acting for
18 or on behalf of the state or a political subdivision thereof.

19 (j) “Service provider” means a person or entity offering an
20 electronic communication service.

21 (k) “Specific consent”—~~is~~ *means* consent delivered directly to
22 the government entity seeking information.

23 (l) “Subscriber information” means the name, street address,
24 telephone number, email address, or similar contact information
25 provided by the subscriber to the provider to establish or maintain
26 an account or communication channel, a subscriber or account
27 number or identifier, the length of service, and the types of services
28 used by a user of or subscriber to a service provider.

29 1546.1. (a) Except as provided in this section, a government
30 entity shall not do any of the following:

31 (1) Compel the production of or access to electronic
32 communication information from a service provider.

33 (2) Compel the production of or access to electronic device
34 information from any person or entity except the authorized
35 possessor of the device.

36 (3) Access electronic device information by means of physical
37 interaction or electronic communication with the device.

38 (b) A government entity may compel the production of or access
39 to electronic information subject to subdivision (d) and only
40 pursuant to a wiretap order pursuant to Chapter 1.4 (commencing

1 with Section 629.50) of Title 15 of Part 1, or pursuant to a search
2 warrant pursuant to Chapter 3 (commencing with Section 1523),
3 provided that the warrant shall not compel the production of or
4 authorize access to the contents of any electronic communication
5 initiated after the issuance of the warrant.

6 (c) A government entity may access electronic device
7 information by means of physical interaction or electronic
8 communication with the device only as follows:

9 (1) In accordance with a wiretap order issued pursuant to
10 Chapter 1.4 (commencing with Section 629.50) of Title 15 of Part
11 1 or in accordance with a search warrant issued pursuant to Chapter
12 3 (commencing with Section 1523), provided that a warrant shall
13 not authorize accessing the contents of any electronic
14 communication initiated after the issuance of the warrant.

15 (2) With the specific consent of the authorized possessor of the
16 device, including when a government entity is the intended
17 recipient of an electronic communication initiated by the authorized
18 possessor of the device.

19 (3) With the specific consent of the owner of the device, only
20 when the device has been reported as lost or stolen.

21 (4) If the government entity, in good faith, believes that an
22 emergency involving danger of death or serious physical injury to
23 any person requires access to the electronic device information.

24 (5) If the government entity, in good faith, believes the device
25 to be lost, stolen, or abandoned, provided that the entity shall only
26 access electronic device information in order to attempt to identify,
27 verify, or contact the owner or authorized possessor of the device.

28 (d) Any warrant or wiretap order for electronic information shall
29 comply with the following:

30 (1) The warrant or order shall be limited to only that information
31 necessary to achieve the objective of the warrant or wiretap order,
32 including by specifying the target individuals or accounts, the
33 applications or services, the types of information, and the time
34 periods covered, as appropriate.

35 (2) The warrant or order shall identify the effective date upon
36 which the warrant or order is to be executed, not to exceed 10 days
37 from the date the warrant is signed, or explicitly state whether the
38 warrant or wiretap order encompasses any information created
39 after its issuance.

(3) The warrant or order shall comply with all other provisions of California and federal law, including any provisions prohibiting, limiting, or imposing additional requirements on the use of search warrants or wiretap orders.

(e) When issuing any warrant or wiretap order for electronic information, or upon the petition from the target or recipient of the warrant or wiretap order, a court may, at its discretion, do any or all of the following:

(1) Appoint a special master, as described in subdivision (d) of Section 1524, charged with ensuring that only information necessary to achieve the objective of the warrant or order is produced or accessed.

(2) Require that any information obtained through the execution of the warrant or order that is unrelated to the objective of the warrant be destroyed as soon as feasible after that determination is made.

(f) A service provider may disclose, but shall not be required to disclose, electronic communication information or subscriber information when that disclosure is not otherwise prohibited by state or federal law.

(g) If a government entity receives electronic communication information voluntarily provided pursuant to subdivision (f), it shall delete that information within 90 days unless the entity has or obtains the specific consent of the sender or recipient of the electronic communications about which information was disclosed or obtains a court order authorizing the retention of the information. A court shall issue a retention order upon a finding that the conditions justifying the initial voluntary disclosure persist, in which case the court shall authorize the retention of the information only for so long as those conditions persist, or there is probable cause to believe that the information constitutes evidence that a crime has been committed.

(h) If a government entity obtains electronic information pursuant to an emergency involving danger of death or serious physical injury to a person, that requires access to the electronic information without delay, the entity shall, within three days after obtaining the electronic information, file with the appropriate court a motion seeking approval of the emergency disclosures that shall set forth the facts giving rise to the emergency. The court shall promptly rule on the motion and shall order the immediate

1 destruction of all information obtained, upon a finding that the
2 facts did not give rise to an emergency.

3 (i) This section does not limit the authority of a government
4 entity to use an administrative, grand jury, trial, or civil discovery
5 subpoena to do either of the following:

6 (1) Require an originator, addressee, or intended recipient of
7 an electronic communication to disclose any electronic
8 communication information associated with that communication.

9 (2) Require an entity that provides electronic communications
10 services to its officers, directors, employees, or agents for the
11 purpose of carrying out their duties, to disclose electronic
12 communication information associated with an electronic
13 communication to or from an officer, director, employee, or agent
14 of the entity.

15 1546.2. (a) Except as otherwise provided in this section, any
16 government entity that executes a warrant or wiretap order or
17 obtains electronic information in an emergency pursuant to Section
18 1546.1 shall contemporaneously serve upon, or deliver by
19 registered or first-class mail, electronic mail, or other means
20 reasonably calculated to be effective, the identified targets of the
21 warrant, order, or emergency request, a notice that informs the
22 recipient that information about the recipient has been compelled
23 or requested, and states with reasonable specificity the nature of
24 the government investigation under which the information is
25 sought. The notice shall include a copy of the warrant or order, or
26 a written statement setting forth facts giving rise to the emergency.

27 (b) If there is no identified target of a warrant, wiretap order,
28 or emergency request or access at the time of its issuance, the
29 government entity shall ~~take reasonable steps to provide the notice,~~
30 ~~within three days of the execution of the warrant, wiretap order,~~
31 ~~or emergency request or access, to all individuals about whom~~
32 ~~information was disclosed or obtained.~~ *submit to the Department*
33 *of Justice within 72 hours a report that states with reasonable*
34 *specificity the nature of the government investigation under which*
35 *the information was sought and includes a copy of the warrant,*
36 *or order, or a written statement setting forth facts giving rise to*
37 *the emergency. The Department of Justice shall publish each report*
38 *received pursuant to this subdivision on its Internet Web site within*
39 *90 days of receiving the report.*

(c) (1) When a wiretap order or search warrant is sought under Section 1546.1, the government entity may submit a request supported by a sworn affidavit for an order delaying notification and prohibiting any party providing information from notifying any other party that information has been sought. The court shall issue the order if the court determines that there is reason to believe that notification may have an adverse result, but only for the period of time that the court finds there is reason to believe that the notification may have that adverse result, and not to exceed 90 days.

(2) The court may grant extensions of the delay of up to 90 days each on the same grounds as provided in paragraph (1).

(3) Upon expiration of the period of delay of the notification, the government entity shall serve upon, or deliver by registered or first-class mail, electronic mail, or other means reasonably calculated to be effective as specified by the court issuing the order authorizing delayed notification, each individual whose electronic information was acquired, a document that includes the information described in subdivision (a), a copy of all electronic information obtained or a summary of that information, including, at a minimum, the number and types of records disclosed, the date and time when the earliest and latest records were created, and a statement of the grounds for the court's determination to grant a delay in notifying the individual.

(d) Except as otherwise provided in this section, nothing in this chapter shall prohibit or limit a service provider or any other party from disclosing information about any request or demand for electronic information.

1546.4. (a) Except as proof of a violation of this chapter, no evidence obtained or retained in violation of this chapter shall be admissible in a criminal, civil, or administrative proceeding, or used in an affidavit in an effort to obtain a search warrant or court order.

(b) The Attorney General may commence a civil action to compel any government entity to comply with the provisions of this chapter.

(c) An individual whose information is targeted by a warrant, wiretap order, or other legal process that is inconsistent with this chapter, or the California *Constitution* or the United States Constitution, or a service provider or any other recipient of the

1 warrant, wiretap order, or other legal process may petition the
2 issuing court to void or modify the warrant, wiretap order, or
3 process, or to order the destruction of any information obtained in
4 violation of this chapter, the California Constitution, or the United
5 States Constitution.

6 (d) A California or foreign corporation, and its officers,
7 employees, and agents, are not subject to any cause of action for
8 providing records, information, facilities, or assistance in
9 accordance with the terms of a warrant, court order, statutory
10 authorization, emergency certification, or wiretap order issued
11 pursuant to this chapter.

12 ~~1546.6. A government entity that obtains electronic information~~
13 ~~pursuant to this chapter shall make an annual report to the Attorney~~
14 ~~General. The report shall be made on or before February 1, 2017,~~
15 ~~and each February 1 thereafter. To the extent it can be reasonably~~
16 ~~determined, the report shall include all of the following:~~

17 ~~(a) The number of requests or demands for electronic~~
18 ~~information.~~

19 ~~(b) The number of requests or demands made, and the number~~
20 ~~of records received for each of the following types of records:~~

21 ~~(1) Electronic communication content.~~

22 ~~(2) Location information.~~

23 ~~(3) Other electronic information.~~

24 ~~(c) For each of the types of records listed in subdivision (b), all~~
25 ~~of the following:~~

26 ~~(1) The number of requests or demands that were each of the~~
27 ~~following:~~

28 ~~(A) Wiretap orders obtained pursuant to this chapter.~~

29 ~~(B) Search warrants obtained pursuant to this chapter.~~

30 ~~(C) Emergency requests pursuant to subdivision (h) of Section~~
31 ~~1546.1.~~

32 ~~(2) The total number of users whose information was requested~~
33 ~~or demanded.~~

34 ~~(3) The total number of requests or demands that did not specify~~
35 ~~a target individual.~~

36 ~~(4) The number of requests or demands complied with in full,~~
37 ~~partially complied with, or refused.~~

38 ~~(5) The number of times the notice to the affected party was~~
39 ~~delayed and the average length of the delay.~~

~~(6) The number of times records were shared with other government entities or any department or agency of the federal government, and the agencies with which the records were shared.~~

~~(7) For contents of electronic communications, the total number of communications contents received.~~

~~(8) For location information, the average period for which location information was obtained or received and the total number of location records received.~~

~~(9) For other electronic communication information, the types of records requested and the total number of records of each type received.~~

~~1546.8.—(a) On or before April 1, 2017, and each April 1 thereafter, the Department of Justice shall publish on its Internet Web site both of the following:~~

~~(1) The individual reports from each government entity that requests or compels the production of contents or records pertaining to an electronic communication or location information.~~

~~(2) A summary aggregating each of the items in subdivisions (a) to (c), inclusive of Section 1546.6.~~

~~(b) Nothing in this chapter shall prohibit or restrict a service provider from producing an annual report summarizing the demands or requests it receives under this chapter.~~

~~SEC. 2.— If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.~~